No. 79-210

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

GLEN R. ANDREWS,

Petitioner,

vs.

A. WARREN CAHILL, Family Court Commissioner for Waukesha County; KENNETH KRAUSE, Attorney; PEB DUDLEY, Constable, and CITY OF OCONOMOWOC,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ROBERT E. SUTTON
1409 East Capitol Drive
Milwaukee, Wisconsin 53211
(414) 981-0802
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on May 11, 1979.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was filed on May 11, 1979 and is set forth in the appendix, pp. App. 6. The pretrial order of the United States District Court for the Eastern District of Wisconsin, Judge Myron L. Gordon, judge presiding, was entered on June 23, 1976 and is set forth in the appendix, pp. App. 1. The final decision of the District Court was entered at the conclusion of the trial on September 14, 1977 and is set forth in the appendix, pp. App. 3.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the Circuit Court of Appeals err in its determination that the trial judge was free to reject the uncontradicted testimony of the petitioner as incredible?

2. Did the District Court err in its pre-trial order granting dismissal of the action against the defendant Krause and granting immunity from liability for damages to the defendant Cahill?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves 42 U.S.C. Sec. 1983.

STATEMENT OF THE CASE

In August of 1973 the wife of the petitioner instituted an action of divorce against the petitioner. Her attorney, the respondent, Kenneth Krause, obtained, on her behalf, an ex parte order from the respondent, A. Warren Cahill, the Family Court Commissioner for Waukesha County, Wisconsin directing that the petitioner vacate the homestead premises immediately upon service of that order. On August 22, 1973 the order was served upon the petitioner by the respondent, Peb Dudley, the petitioner vacated the home premises. On February 5, 1975 a divorce was granted. All during that interim period the petitioner resided at separate premises from his wife and children pursuant to the order to vacate.

Petitioner commenced an action pursuant to the provisions of 42 U.S.C. Sec. 1983 pro se by a complaint filed on February 18, 1976. The respondent, Krause, was dismissed from the action by the order of the Court dated June 23, 1976. Trial was held on September 14, 1977, at which time petitioner was represented by counsel, the respondent, A. Warren Cahill, by counsel and the respondent, Peb Dudley, pro se. During the course of the trial the petitioner testified, inter alia, that after the service of the initial order to vacate a hearing was held before the respondent, A. Warren Cahill on August 28, 1973 attended by the petitioner, the petitioner's wife, the respondent, Krause and the respondent, Cahill. No record of that hearing was made, as apparently was the practice, and petitioner testified that his efforts to challenge the order to vacate were rebuffed by the respondent Cahill under the threat of contempt. Petitioner testified that no evidence was ever adduced directed to the order to vacate at the

proceedings on August 27, 1973 or at any time subsequent prior to the divorce on February 5, 1975. The testimony of the petitioner as recited above was not contradicted by any evidence adduced by respondent on the trial. On the motion of petitioner's counsel the trial court took judicial notice of *Geisinger* v. *Voss,* 352 F.Supp. 104, decided December 26, 1972. The respondent Dudley testified as an adverse witness for petitioner that he served the initial order to vacate upon the petitioner and ordered that the petitioner leave the home premises upon the direction of the respondent, Attorney Kenneth Krause and that at the time of the service of the order he, the respondent, Dudley, was unaware of the decision in *Geisinger* v. *Voss.* The respondents introduced as evidence in defense only the copy of the judgment, findings of fact, amended temporary order and excerpt of testimony in the case of *Andrews* v. *Andrews,* County Court of Waukesha, County Court Case No. 21578. After argument, the trial court dismissed the action specifically holding on the merits that he rejected the evidence adduced from the petitioner on the issue of the proceedings held five days after the order as incredible.

An appeal from the pre-trial decision and order of the Court dismissing the action as to the respondent Krause and limiting the liability of the respondent Cahill and from the ultimate decision of the Court dismissing the action as to all of the respondents after trial was taken to the Circuit Court of Appeals for the Seventh Circuit and on May 11, 1979 the decision of the trial court was affirmed.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUIT COURT OF APPEALS ERRED IN ITS DETERMINATION THAT THE TRIAL JUDGE WAS FREE TO REJECT THE UNCONTRADICTED TESTIMONY OF PETITIONER AS INCREDIBLE.

In deciding the merits of this case against the petitioner it was necessary for the court to disregard the petitioner's testimony on the critical issue of what transpired at proceedings held on August 27, 1973. The petitioner had testified that at that time when he attempted to raise the issue of the order to vacate the premises he was frustrated by the order of the respondent Cahill to desist on that matter under threat of contempt. The Court in evaluating this critical testimony stated:

> "I am aware that Mr. Andrews has testified that at the hearing that was held within a reasonable time after the original eviction order he was denied the right to raise the question. I find that testimony incredible. I reject it. I recognize that there is no testimony to the contrary, but I am not compelled to accept Mr. Andrews' partisan viewpoint that the Family Court Commissioner precluded him from raising this issue."

It is respectfully submitted that the District Court was clearly in error in this respect. There was nothing inherently incredible in the testimony of the petitioner and no testimony was adduced to contradict the assertions made or to establish any policy or procedure by the respondent Cahill so that any "regularity" that attended such hearings could be referred to.

It is an established principle of evidence that "uncontradicted evidence which is not improbable or unreason-

able cannot be disregarded, even if it comes from an interested witness, and, unless shown to be untrustworthy, is conclusive and binding on the trier of fact.' 32A C.J.S. Evidence Sec. 1038, pp. 727-735. *Quock Ting* v. *U.S.* (1891) 140 U.S. 417, 420-421, 11 S.Ct. 733, 35 L.Ed. 501; *Southeastern Canteen Co.* v. *Commissioner of Internal Revenue* (6th Cir. 1969) 410 F.2d 615, 624, cert. denied 396 U.S. 883, 90 S.Ct. 89, 24 L.Ed. 84; *Dudley* v. *U.S.* (9th Cir. 1970) 428 F.2d 1196; *Sholly* v. *Annan* (9th Cir. 1971) 450 F.2d 74; *Browning* v. *Crouse* (10th Cir. 1966) 356 F.2d 178, cert. denied 86 S.Ct. 1864, 384 U.S. 973, 16 L.Ed. 2d 683. The law of the forum State of Wisconsin is in accord. *Lopez* v. *Prestige Gas Co.* (1971) 53 Wis. 2d 25, 191 N.W. 2d 908; *State* v. *Public Service Commission* (1962) 16 Wis. 2d 231, 114 N.W. 2d 554; *Thiel* v. *Damrau* (1954) 268 Wis. 76, 66 N.W. 2d 747. Therefore, on the trial to the court it was an abuse of discretion for the court to label testimony as incredible and reject it without a basis therefor. It is certainly illogical to claim a failure of proof on behalf of the petitioner because he did not call the respondent Cahill or the respondent Krause or the petitioner's ex-wife to testify with regard to the hearing. Those witnesses, whose interest is obviously adverse to the petitioner, were available to the respondents to rebut the testimony, if in fact they could. And their failure to testify on behalf of the defense gives rise to the fair inference that they could not rebut the testimony. To quote again from Corpus Juris Secundum:

> "Where the evidence tends to establish a fact which it is within the power and to the interest of the opposing party to disprove, if false, his failure to attempt to disprove it strengthens the probative force of the evidence tending to prove it." 32 C.J.S. Evidence, Sec. 1038, p. 735. *Jersey City Dry Docks Co.* v. *O'Brien Brothers* (E.D. N.Y. 1943) 51 F. Supp. 958.

To obligate a party litigant in order to sustain his burden of proof to buttress his testimony with that of the party adverse in the litigation is to impose an impossible condition upon the petitioner.

II. THE PRE-TRIAL ORDER DISMISSING THE ACTION AS TO THE RESPONDENT KRAUSE AND LIMITING THE LIABILITY OF THE RESPONDENT CAHILL WAS IN ERROR.

Of critical significance in determining the impropriety of the court's pre-trial order are the unrebutted facts adduced at the trial concerning the respondents, Attorney Krause and Family Court Commissioner Cahill. The facts adduced at the trial disclose that on December 26, 1972, fully eight months before petitioner was ordered from his home as a result of an ex parte proceeding which the record discloses included no evidence of any threat to the health or welfare of the wife of the petitioner, the unconstitutionality of such procedure had been determined by the federal court in *Geisinger* v. *Voss* (E.D. Wis. Dec. 26, 1972) 352 F.Supp. 104. The respondent Cahill was a principal party defendant in that litigation and certainly by August of 1973 could not claim ignorance of the decision or the lawlessness of his actions. Likewise, the respondent Krause as an attorney practitioner could not be absolved from active conspiracy to violate the constitutional rights of the petitioner because of ignorance of the law or good faith reliance upon the actions of the respondent Cahill. It is of note that neither respondent presented such a defense upon the trial.

The immunity from liability for damages afforded to the respondent Cahill because of his quasi-judicial capacity as a Family Court Commissioner is to be extended only in those circumstances where the court acts within its

jurisdiction. *Pearson* v. *Ray* (1967) 386 U.S. 547; *Jacobson* v. *Schafer* (7th Cir. 1971) 441 F.2d 127; *Harris* v. *Harvey* (E.D. Wis. 1976) 419 F.Supp. 30. Under the circumstances of the case at bar, in light of the federal court decision in *Geisinger* v. *Voss,* the jurisdiction of the respondent A. Warren Cahill had been specifically outlined since December 26, 1972. Without the presentation of adequate evidence to establish the likelihood of injury to the person or welfare of a wife in a divorce case or a hearing concerning that issue within a reasonable time, the jurisdiction of respondent Cahill was judicially restricted from directing a husband in divorce litigation to vacate his living quarters. Such an order, as was issued in the case at bar, was a direct contempt and beyond the jurisdiction. It must be noted that there was no specific authority in the Wisconsin statutory law allowing the issuance of such an ex parte order before *Geisinger* v. *Voss.* Such orders were issued under an interpretation of Section 247.23(1), Wis. Stats. and executed by police officials, under the pertinent police power regulations of the State of Wisconsin.

Likewise the actions of the respondent Krause in ordering the respondent Dudley to execute the unlawful order were clearly intended to and did advance the deprivation of the petitioner's constitutional rights. The case cited by the District Court as authority for dismissal of the action against respondent Krause is inapposite. *Dyer* v. *Rosenberg* (9th Cir. 1970) 434 F.2d 648. *Dyer* is a one paragraph opinion involving a retained attorney in a criminal case. Cf. *U.S. General Inc.* v. *Schroeder* (D.C. Wis. 1975) 400 F.Supp. 713, wherein Judge Warren held that a cause of action under 42 U.S.C. 1983 may be sustained against an attorney who willfully prosecutes a clearly unconstitutional action. The complaint alleged a conspiracy to prosecute such an action and overt acts which accomplished the

constitutional deprivation. The evidence adduced at trial sustained the allegations. Under all the attendant circumstances it was error to dismiss the action against any of the respondents.

CONCLUSION

For the foregoing reasons stated above certiorari should be granted and the order of the United States Court of Appeals for the Seventh Circuit dated May 11, 1979 should be reversed.

Respectfully submitted,

ROBERT E. SUTTON
Attorney for Petitioner

APPENDIX

APPENDIX

DECISION AND ORDER
Of June 23, 1976
(Formal Portions Omitted)

The defendants Cahill and Krause have brought separate motions to dismiss. Each motion asserts a lack of federal jurisdiction and a failure to state a claim upon which relief can be granted. In addition, Mr. Krause contends that service upon him was insufficient.

In his complaint, the plaintiff charges that his civil rights were violated in connection with a domestic relations action when the family court commissioner for Waukesha County, the defendant Cahill, issued an ex parte order requiring Mr. Andrews to vacate his home. In my opinion, the court has jurisdiction of this action pursuant to 28 U.S.C. § 1343(3) and (4).

The principal thrust of Mr. Cahill's motion to dismiss is his contention that he enjoys immunity pursuant to Pierson v. Ray, 386 U.S. 547 (1967). Insofar as the plaintiff's action seeks monetary damages from the defendant Cahill, the latter's motion to dismiss is well taken. Skolnick v. Campbell, 454 F.2d 531 (7th Cir. 1971); Jacobson v. Schaefer, 441 F.2d 127, 129 (7th Cir. 1971); Bromund v. Holt, 24 Wis. 2d 336, 341 (1964). However, insofar as the complaint seeks injunctive and declaratory relief, the foregoing authorities do not support a motion to dismiss. In Pierson v. Ray, at page 554, the Court expressly observed that judges have immunity "from liability *for damages* for acts committed within their judicial jurisdiction." (emphasis added). Accordingly, the defendant Cahill's motion for dismissal cannot be granted except as to that portion of the complaint which seeks damages against him.

The defendant Krause's motion for dismissal should be granted because it is apparent from the face of the complaint that Mr. Krause acted in a private capacity as Mrs. Andrews' lawyer. It is thus clear that he did not deprive the plaintiff of any of the latter's civil rights under color of state law. Dyer v. Rosenberg, 434 F.2d 648 (9th Cir. 1970).

Therefore, IT IS ORDERED that the motion of the defendant Cahill for dismissal be and hereby is denied except insofar as the plaintiff's action seeks damages against said defendant.

IT IS ALSO ORDERED that the motion of the defendant Krause for dismissal be and hereby is granted, and this action is dismissed as to said defendant.

Dated at Milwaukee, Wisconsin, this 23rd day of June, 1976.

s/s MYRON L. GORDON
U.S. District Judge

DECISION AND ORDER

I will proceed to the merits.

I think the part of the problem that we have in the case at bar is that there is a great trauma that attends a removal of a person from his home, and the Court is sympathetic with that problem. It is reflected in Judge Reynolds' observation in *Geisinger against Voss*, 352 F.Supp. 104, and it certainly is true that one should not be evicted from his dwelling place absent justification or an opportunity to be heard.

Now the fact that there was no opportunity to be heard is not automatically controlling here because this is not a situation where the power of the United States or the power of adversaries is being utilized to usurp Mr. Andrews' homestead. On the contrary, it represents a balancing of interest by a judicial tribunal as to which of two parties should have possession of quarters at a time when by hypothesis there is such conflict between the two that it is inappropriate that they both share the same quarters.

Now that leads us to the question of who had the burden of establishing the absence or presence of justification for the original order requiring Mr. Andrews to vacate.

I am persuaded that the plaintiff has that burden, and Mr. Andrews has not persuaded the Court that Mr. Cahill, in his capacity as Family Court Commissioner, was without valid justification in entering the original order. It is perhaps unfortunate that we do not have the benefit of the petition to the Family Court Commissioner, or that we do not have the Family Court Commissioner's testimony. I am not sure either would be helpful, or let alone definitive, but the absence of those items does not assist the plaintiff because, repeating myself, it is the plaintiff's burden to have convinced the trier of fact, namely me,

that there was a want of valid justification for the original order.

Now part of the justification, at least with reference to due process, is the availability of a prompt hearing at which that issue could be raised, and in this respect it is arguable that *Geisinger* v. *Voss* has been limited to some extent because that case was decided in reliance upon *Fuentes* v. *Shevin* in 407 U.S., whereas shortly thereafter *Mitchell* v. *Grant* was decided and that somewhat undercut the Fuentes decision because it stressed the fact that there was available shortly thereafter an opportunity for a hearing on the issue of the taking.

Now that presents the next issue for the Court's attention, namely, whether the availability of a hearing before the Family Court Commissioner, after the original order requiring Mr. Andrews to vacate the premises, relieves the defendant Cahill of the claim of violation of due process in connection with Mr. Andrews' otherwise important right to remain in his home.

I am aware that Mr. Andrews has testified that at the hearing that was held within a reasonable time after the original eviction order he was denied the right to raise the question. I find that testimony incredible. I reject it. I recognize that there is no testimony on the record to the contrary, but I am not compelled to accept Mr. Andrews' partisan viewpoint that the Family Court Commissioner precluded him from raising this issue.

I think the Court should presume regularity, and I do presume regularity, and I presume the fact that the hearing that was held gave Mr. Andrews an opportunity to raise this issue. The existence of great tensions on his part, as well as on the part of his wife, at a hearing such as was held, makes it understandable that he would not be in a good position to evaluate what the Court Commissioner did or did not do at that time. It is unfortunate that he was not represented. It is perhaps unfortunate that a record was not made of what transpired there; but, once again, it is the plaintiff's burden to convince the Court that he was denied a opportunity at that hearing to be heard on the question of occupancy, and he has not met that burden.

Whether he should have called Mr. Cahill adversely or called his wife, ex-wife, or the attorney who represented Mrs. Andrews, or the Clerk, or whoever else might have been present, I can't suggest. All I can tell you is based upon a record before me, where all I have is the partisan observations of a litigant who was attending those proceedings pro se, I am not impressed with his contention that he was denied an opportunity to be heard on the question of occupancy.

I find no reason to reverse my previous ruling that Mr. Krause is not a proper party defendant in these proceedings. I find no basis for an award of damages to the plaintiff. I find no basis for entertaining a injunctive or declaratory order against any of the defendants.

I think it is clear that Mr. Dudley was a perfunctory administrative officer and did nothing except to carry out the instructed mechanical obligations that were imposed upon him by his job, and under no circumstance, in my opinion, could he be held liable to plaintiff.

The statements that I have made shall constitute my findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

I conclude by holding that Mr. Andrews has not met the burden of proving his claim, as alleged in his complaint, and therefore his action must be dismissed upon its merits with costs to the defendants.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

Argued November 14, 1978
May 11, 1979.

Unpublished Order
Not to be cited per Circuit Rule 35

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LATHAM CASTLE, *Senior Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*

GLEN R. ANDREWS, Plaintiff-Appellant,
No. 77-2144 vs.

A. WARREN CAHILL, Family Court Commissioner for Waukesha County, KENNETH KRAUSE, Attorney, and TED DUDLEY, Constable, City of Oconomowoc,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 76-C-110
MYRON L. GORDON, *Judge.*

ORDER

Plaintiff-appellant Glen Andrews appeals from the judgment for the defendants entered by the district court after a bench trial and from a pre-trial order dismissing the

cause of action as to certain defendants and issues. We affirm.

The complaint alleges that the defendants, a state Family Court Commissioner (Cahill), a local constable (Dudley), and a private attorney (Krause) representing Andrews' former wife, conspired to deprive Andrews of his constitutional rights in violation of 42 U.S.C. § 1983. The alleged conspiracy arose when Krause commenced a divorce action on behalf of Andrews' then wife against Andrews. Among the grounds for divorce alleged by Andrews' wife was a charge that Andrews had threatened her life. Cahill issued an order to show cause why certain standard orders regarding temporary alimony, attorneys fees, custody of the children, etc., should not be entered pending disposition of the divorce action. The order to show cause also included an order "[t]hat promptly upon service of this Order [Andrews] shall vacate the household of the parties." The order was a printed form submitted by Krause and was signed by Cahill on August 21, 1973 and made returnable on August 27. Dudley served the order, along with the summons and petition for temporary relief, on August 22, and Andrews vacated the family household that night as ordered. A hearing was held on August 27, at which Andrews alleges he was not given a fair opportunity to contest the order to vacate. Andrews' federal complaint alleges that defendants conspired to deprive him of his rights both through issuance of the ex parte order to vacate and the inadequate post-order hearing. He seeks damages and declaratory and injunctive relief.

On this appeal, Andrews raises only two points. First he argues that the district court erred in granting Cahill's pre-trial motion to dismiss as to damages on the ground of judicial immunity, and Krause's motion to dismiss in its

entirety on the ground that his actions were not under color of law. As to Cahill, not only was the district court correct in dismissing the claim for damages against him because he enjoys judicial immunity, *Stump* v. *Sparkman,* 435 U.S. 349 (1978); *Pierson* v. *Ray,* 386 U.S. 547 (1967), but under settled law, that immunity protects Dudley as well, since he was merely performing a ministerial act in serving an order of the court valid on its face, *Bryan* v. *Ker,* 222 U.S. 107, 113 (1911); *Matthews* v. *Densmore,* 109 U.S. 216 (1883); *Erskine* v. *Hohnbach,* 81 U.S. (14 Wall.) 613, 616 (1871); *Duba* v. *McIntyre,* 501 F.2d 590, 592 (8th Cir. 1974), *cert. denied,* 424 U.S. 975 (1976); *Fowler* v. *Alexander,* 478 F.2d 694 (4th Cir. 1973); *Mississippi ex rel. Giles* v. *Thomas,* 464 F.2d 156 (5th Cir. 1972).

The district court was also correct in dismissing the cause of action as to Krause. The complaint fails to allege a conspiracy with sufficient particularity to bring Krause's conduct in representing Andrews' wife within the reach of § 1983. *Sparkman* v. *McFarlin,* No. 76-1706 (7th Cir. May 2, 1979). The only allegation of any agreement among the defendants is that "[d]efendants knowingly agreed to commit, and did commit, against [Andrews] . . . the Common law tort of deceit," based upon Andrews' allegations that, unknown to him, the practice was not to enforce an initial order to vacate, but simply to issue another if the husband refused to leave the household. Such a bald allegation of conspiracy is insufficient to show that Krause acted under color of law. The facts alleged are merely that Krause submitted a printed form petition for temporary relief pending a divorce action which Cahill signed and Dudley served. Such "factual allegations do not support [the] conclusory statements" that a conspiracy existed. *Sparkman, supra,* slip op. at 10 (Sprecher, J., concurring, quoting *Johnson* v. *Stone,* 268 F.2d 803, 804 (7th Cir. 1959)). Here,

the state did no more than provide a disinterested forum for the divorce action. *See Sparkman, supra,* slip op. at 14 (Sprecher, J., concurring); *id.,* at 17 (Tone, J., concurring, with whom Fairchild, C.J., concurred); *id.,* at 23-24 n.6 (Swygert, Cummings, and Wood, J.J., dissenting).

Thus, Andrews' claim for damages should have been dismissed against both Cahill and Dudley, and the suit in its entirety was correctly dismissed against Krause. Andrews' remaining claims for declaratory and injunctive relief from the order to vacate the family household are moot. Andrews' divorce became final before this action was even commenced. Thus neither declaratory nor injunctive relief could have any effect on Andrews' legal rights; indeed, as to these claims, it is doubtful that there was a case or controversy sufficient to invoke the district court's jurisdiction in the first instance. *See Geraghty* v. *U.S. Parole Comm.,* 579 F.2d 245-247 (3d Cir. 1978).

Moreover, Andrews' second contention asserts only that the trial judge erred in disregarding Andrews' uncontradicted testimony about the opportunity he was given to contest the order to vacate at the August 27, 1973 hearing before Cahill. The district court made an express finding that Andrews' testimony on that point was incredible and rejected it. The trial court, as the trier of fact, had the opportunity to observe Andrews' demeanor and was free to reject his testimony which it found unworthy of belief. *Glenroy Const. Co.* v. *N.L.R.B.,* 527 F.2d 465, 469 (7th Cir. 1975).

Accordingly, the judgment of the district court is affirmed and the clerk of the court is directed to enter judgment accordingly.